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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CALIFORNIA EDUCATION COMMITTEE, LLC and PRISCILLA SCHREIBER, Plaintiffs, v. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California; JACK O'CONNELL in his official capacity as California Superintendent of Public Instruction; and DOES 1 through 20 inclusive, Defendants.	Case No.: 07-CV-02246-BTM-WMC Judge: Hon. Barry Ted Moskowitz **[PROPOSED] MEMORANDUM OF POINTS AND AUTHORITIES OF AMICI CURIAE EQUALITY CALIFORNIA AND GAY-STRAIGHT ALLIANCE NETWORK IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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MEMORANDUM OF POINTS AND AUTHORITIES

Equality California and the Gay-Straight Alliance Network ("GSA Network") respectfully submit the following proposed Memorandum of Points and Authorities as Amici Curiae in support of the Motion to Dismiss filed on January 11, 2008 by the State Defendants.[1]

I. INTRODUCTION

Plaintiffs California Education Committee, LLC and Patricia Schreiber (collectively "CEC" or "Plaintiffs") bring a facial, pre-enforcement challenge to various provisions of the California Penal Code and the California Education Code. Specifically, Plaintiffs challenge California Penal Code sections 422.55(a)(2) and (6), 422.55(b), 422.56(c), and 422.6(a)[2] and California Education Code sections 210.7, 212.6, 220, and 51500. Complaint for Declaratory and Injunctive Relief and Nominal Damages ("Complaint"), ¶ ¶ 29, 30. Plaintiffs' First Cause of Action alleges that these code sections are void for vagueness under the Due Process Clause of the Fourteenth Amendment of the federal Constitution. Complaint, ¶ ¶ 28-33. Plaintiffs' Second Cause of Action alleges that these code sections violate the Privacy Clause of article 1, section 1 of the California Constitution. Complaint, ¶ ¶ 34-37.

Plaintiffs seek a declaration that these statutory provisions are invalid and an injunction barring their enforcement. Complaint, pp. 10-11. Plaintiffs also seek "reasonable costs and expenses of this action, including attorneys' fees, in accordance with 42 U.S.C. § 1988."[3] Complaint, p. 11.

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[1] Equality California and the GSA Network filed a Motion to Intervene in this action on December 21, 2007. Currently, that Motion to Intervene is scheduled to be heard on February 15, 2008, the same date that the Court is scheduled to hear the State Defendants' Motion to Dismiss. Accordingly, while their Motion to Intervene is pending, Equality California and the GSA Network seek leave to file this Memorandum of Points and Authorities as Amici Curiae in order to ensure that their views on the Motion to Dismiss are before the Court in a timely fashion.

[2] Except as expressly noted otherwise references to Codes in the text and footnotes shall be to California Codes. Plaintiffs' First Cause of Action incorrectly cites the challenged Penal Code sections as "420.6(a), 420.55(a)(2) and (6), 420.55(b) and 420.56(c)," which do not exist.

[3] The Complaint's prayer for relief does not include a request for nominal damages; however, the Complaint is styled as a "Complaint for Declaratory and Injunctive Relief and Nominal Damages." Complaint, ¶¶ 1, 10-11.

Facial invalidation of a statute is "manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." *Gospel Missions of Am. v. City of Los Angeles,* 419 F.3d 1042, 1047 (9th Cir. 2005) (internal quotation omitted). This is particularly so where, as here, the challenged statutes implicate important state interests and where adjudication of the claim may require resolution of novel state law issues. In such cases, federal courts must take special care to ensure that Article III standing and other justiciability requirements are met, and that plaintiffs have stated valid legal claims. In this case, Plaintiffs improperly seek to invalidate core California state-law protections against hate violence and discrimination in public schools based upon hypothetical fears and implausible constructions of California law, many of which contradict controlling California Supreme Court authority.

For the reasons set forth by the State Defendants in their Motion to Dismiss, as well as for the additional reasons set forth below, Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and for failure to state a claim under which relief can be granted pursuant to Rule 12(b)(6).[4] This Court should also decline to exercise supplemental jurisdiction over Plaintiffs' state law claims.

II. FACTUAL AND STATUTORY BACKGROUND

Amici adopt the description of the facts and the relevant statutes in the State Defendants' Motion to Dismiss.

III. ARGUMENT

A. The Complaint Should Be Dismissed Pursuant To Rule 12(b)(1) Because Plaintiffs Lack Standing And Their Claims Are Not Ripe.

Because federal jurisdiction is limited to "actual cases and controversies," plaintiffs invoking federal court jurisdiction must establish both standing and ripeness. *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 848 (9th Cir. 2007). In order to establish Article III standing, a plaintiff must demonstrate that he has suffered an "injury-in-fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders*

[4] Amici adopt the description of the applicable legal standards under Rule 12(b) in the State Defendants' Motion to Dismiss.

of Wildlife, 504 U.S. 555, 560 (1992); *Harris v. Bd. of Supervisors*, 366 F.3d 754, 761 (9th Cir. 2004) ("plaintiffs must allege an imminent threat of concrete injury"). The related Article III requirement of ripeness similarly requires that plaintiffs face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Thus, "in many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc).

In a pre-enforcement challenge to a statute, the Ninth Circuit uses "the same test to determine if a plaintiff has established standing based on a fear of prosecution that [the Ninth Circuit] use[s] to determine if a case or controversy is sufficiently ripe." *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 773 (9th Cir. 2006). Under that test, a court must consider: (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under the challenged statute." *California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1094 (9th Cir. 2003) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 200 F.3d at 1139). These "factors . . . ensure that courts will not decide cases in which a risk of prosecution is so remote that no 'case or controversy' exists." *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 855 (9th Cir. 2002).

The above test applies even when plaintiffs base their claim on the First Amendment. *Getman*, 328 F.3d at 1095. Although the U.S. Supreme Court has adopted a more relaxed standard of justiciability in some First Amendment cases, it is well settled that plaintiffs bringing a pre-enforcement challenge to a statute on First Amendment grounds must show that "plaintiff's intended speech arguably falls within the statute's reach" and that there is "a credible threat that the challenged provision will be invoked against the plaintiff." *Id.*; *see also Alaska Right to Life Political Action Comm.*, 504 F.3d at 851(plaintiffs bringing a pre-enforcement First Amendment challenge must have "an actual and well-founded fear that the law will be enforced against them") (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)).

As explained below with respect to each of Plaintiffs' void-for-vagueness claims, Plaintiffs cannot meet this test.

1. Plaintiffs have not shown a credible fear of prosecution under the challenged Penal Code sections.

Plaintiffs challenge two Penal Code sections defining the underlying acts that constitute a hate crime: section 422.6(a) ("No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55"); and section 422.55(b) ("'Hate crime' includes, but is not limited to, a violation of Section 422.6."). In addition, Plaintiffs challenge three Penal Code sections that refer to or define sexual orientation and gender as protected classifications: section 422.55(a)(2) (listing "gender"); section 422.55(a)(6) (listing "sexual orientation"); and section 422.56(c) (defining "gender"). Based on the applicable test, Plaintiffs cannot demonstrate that they face "a genuine threat of imminent prosecution [under these provisions] and not merely an imaginary or speculative fear of prosecution." *Sacks*, 466 F.3d at 773 (internal quotations omitted).

First, Plaintiffs have not alleged a "concrete plan to violate the law" because they have not alleged any intended conduct that "arguably falls within the statute's reach." *Getman*, 328 F.3d at 1095. Plaintiffs allege that they may violate the Penal Code "should they *fail to guess* properly at an individual's self-defined sex," Complaint ¶ 26 missing (emphasis added), or should they "inadvertently discriminate against an individual based upon their self-defined sex," Complaint, ¶ 21. On its face, however, the hate crime law penalizes conduct only where a person "willfully" intends to deprive another person of a protected right. Penal Code 422.6(a) (emphasis added). The California Supreme Court has held that the term "willfully" means that the hate crime law "require[s] proof of a *specific intent* to interfere with a person's right protected under state or federal law." *In re M.S.*, 10 Cal.4th 698 (1995) (emphasis added) (citing *People v. Lashley* 1 Cal. App.4th 938, 947-49 (Cal. Ct.App. 1991)); *see also Venegas v. County of Los Angeles*, 32 Cal.4th 820, 848 (Cal. 2004) (the hate crime statute "requires a showing that the violator acted with unlawful discriminatory intent").

In light of this controlling California precedent, Plaintiffs cannot establish a credible threat of prosecution under the hate crime statute based on "inadvertent" discrimination or any alleged inability to ascertain a person's "self-defined sex" under California law. An educator or administrator who simply "failed to guess properly" or "inadvertently discriminated" would lack the required "specific intent to interfere with a person's right protected under state or federal law." *In re M.S.*, 10 Cal. 4th at 713; *see also Lashley*, 1 Cal.App.4th at 949 ("The conduct which section[] 422.6 [] is intended to reach is not the mere reckless use of force, even if motivated by ill will, but rather the execution of a specific purpose to deprive another individual of his or her civil rights.").

The Complaint fails to demonstrate a credible risk of prosecution under the hate crime law for another, independent reason, as well. Plaintiffs allege that an educator or administrator might violate the Penal Code by interfering with a student's or a teacher's access to a bathroom or other sex-restricted facility "by intimidation, oppression, or threat of suspension." Complaint, ¶ 26. Under controlling California law, however, it is plain such actions do not fall within the ambit of the hate crime law.

Contrary to Plaintiffs' allegations, a person can be prosecuted under the California hate crime law only for acts that involve violence or the threat of violence. In order to be prosecuted for a hate crime, a person must engage in a "criminal act" involving the use of physical "*force* or *threat of force*." Penal Code §§ 422.55 (a), 422.6 (a) (emphasis added). Section 422.6(c) of the hate crime law further provides that: "no person may be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the *speech itself threatened violence* against a specific person or group of persons and that the *defendant had the apparent ability to carry out the threat*." (emphasis added). The California Supreme Court has narrowed these requirements even further, holding that Section 422.6 proscribes only threats that would cause "a reasonable person . . . to believe he or she will be subjected to physical violence." *In re M.S.*, 10 Cal. 4th at 710 (1995) (rejecting First Amendment vagueness challenge to California hate crime law); *see also People v. Dunkle*, 36 Cal.4th 861, 971 (2005) (same). Thus, Plaintiffs' allegation that an educator might violate the Penal Code merely by threatening a student with suspension or by engaging in other types of non-violent "intimidation" or "oppression" is not credible.

Moreover, Education Code 44807 provides a safe harbor for any such good faith mistakes by exempting school staff from criminal prosecution for exercising a reasonable degree of "physical control" over students. Education Code 44807 provides: "A teacher, vice principal, principal, or any other certificated employee of a school district, shall not be subject to criminal prosecution or criminal penalties for the exercise, during the performance of his duties, of the same degree of physical control over a pupil that a parent would be legally privileged to exercise but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning."

In addition to failing to allege any intended conduct that would be prohibited by the hate crime statutes, Plaintiffs' allegations are too speculative and indefinite to demonstrate a "concrete plan to violate the law." *See Getman*, 328 F.3d at 1094. Even where a plaintiff's intended conduct is clearly prohibited by a challenged law, the plaintiff must do more than state a "general intent to violate a statute at some unknown date in the future." *Thomas*, 220 F.3d at 1139. In *Thomas*, landlords challenged a state law prohibiting discrimination against unmarried couples by alleging that they intended to violate the law at some point "in the future -- if and when a married couple attempt[ed] to lease one of their rental properties." *Id*. at 1140. The plaintiffs' alleged intended conduct – refusing to rent to an unmarried couple – unquestionably would have violated the challenged statute; however, the Ninth Circuit held that it was too indefinite to "qualify as a concrete plan." *Id*; *see also San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996) (a general intention to engage in conduct proscribed by the Crime Control Act "some day," without describing concrete plans, was insufficient to establish standing). In this case, Plaintiffs are even less able to demonstrate a credible threat of prosecution because they do not allege even a general intent to violate the challenged law "some day," at some unspecified future time. Rather, they describe only a generalized fear that they might "inadvertently" violate the statute, based on hypothetical situations that may never arise. Hate crime protections based on sexual orientation and gender (including gender identity) have existed in California since 2000, and yet Plaintiffs do not allege that they have ever actually encountered any of the conjectural scenarios they describe, such as being unable to discern a person's "self-identified sex," either in the context of bathrooms or any other context, or indeed that they have been affected by the existence of protections against hate violence based on sexual orientation and gender in any concrete way.

The second and third factors also support dismissal of Plaintiffs' claims. Plaintiffs do not allege that they have received any specific warnings or threats – either from prosecuting authorities or anyone else – that they may be prosecuted for a hate crime based on any of the hypothetical scenarios in their Complaint. In addition, although the protections Plaintiffs challenge have existed for several years, Plaintiffs do not allege any record of past discipline or lawsuits brought against educators, administrators or anyone else for "inadvertently discriminat[ing] against an individual based upon their self-defined sex," "fail[ing] to guess properly at an individual's self-defined sex," or "interfer[ing] with, or threaten[ing] to interfere with, any student or employee seeking access to facilities traditionally reserved to the opposite sex." Complaint, ¶ ¶ 20, 23, 26.

2. Plaintiffs do not have a credible fear of discipline or civil liability under the challenged Education Code sections 210.7, 212.6, and 220.

Plaintiffs also challenge Education Code section 210.7, which defines the term "gender;" Education Code section 212.6, which defines "sexual orientation'" and Education Code section 220, which includes "gender" and "sexual orientation" as prohibited grounds for discrimination "in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils receiving state student financial aid." Complaint, ¶ 29.[5]

Plaintiffs do not have a credible fear of discipline or civil liability under these challenged provisions. First, Plaintiffs allege only a hypothetical fear that they may "inadvertently" violate these sections in some unspecified manner, based on unspecified circumstances, and at some unspecified time. Complaint, ¶ 21. Under well-settled law, such a generalized fear is too indefinite and speculative to "qualify as a concrete plan." *See Thomas*, 220 F.3d at 1140.

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[5] Plaintiffs' Complaint challenges these provisions "*as amended* by Senate Bill 777." (Complaint, ¶ 29: 6 (emphasis added)). As explained by the State Defendants in their Motion to Dismiss, however, SB 777's amendments to these sections of the Education Code were non-substantive. See Motion to Dismiss, at 4-5.

The second and third factors of the pre-enforcement test also strongly support dismissal of these claims. The Education Code has prohibited discrimination based on sexual orientation and gender (including gender identity) since 2000. Nonetheless, Plaintiffs do not allege that they have received any specific warnings or threats of discipline for restricting access to a bathroom or locker room, for failure to correctly identify a person's sex, or for any other conduct described in the Complaint. Plaintiffs also do not allege that the challenged provisions have been enforced to penalize or proscribe such conduct. When plaintiffs cannot show "'that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Thomas*, 220 F.3d at 1140 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)).

3. Plaintiffs do not have a credible fear of discipline or civil liability under Education Code section 51500.

Plaintiffs also fail to allege that they intend to engage in conduct that would be prohibited by Education Code section 51500.[6] Plaintiffs' sole allegation with respect to Education Code section 51500 is a hypothetical concern that "any curriculum or instruction that pre-assumes the existence of a mother and father in a family relationship might be construed to promote a discriminatory bias against persons choosing alternative relationships." Complaint, ¶ 22. Amici concur with the State that such a mere reference to the existence of families consisting of mothers and fathers, without any disparagement of other families based on any of the characteristics in section 200, does not even "arguably fall[] within the statute's reach." *See* Motion to Dismiss, at 14 (citing *Getman,* 328 F.3d at 1095). In *Getman*, the Ninth Circuit held that a non-profit organization lacked standing to challenge the alleged vagueness of certain restrictions on "advocacy" in a campaign finance law based on the group's intent to publish candidate responses to a candidate questionnaire. *Id.* at 1096. The Court held that because the group's intended communication was "purely informational," the organization "[did] not face a credible threat of prosecution." *Id.* A similar conclusion is appropriate here.

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[6] Education Code section 51500 provides that: "No teacher shall give instruction nor shall a school district sponsor any activity that promotes a discriminatory bias because of a characteristic listed in Section 200."

The second and third factors of the test governing pre-enforcement challenges also favor dismissal of this claim. SB 777 added "sexual orientation" and "gender" to the list of enumerated characteristics in Education Code Section 51500. Thus, Plaintiffs may argue that the absence of specific warnings or any record of past enforcement means little, since these protections were added only this year. As the State correctly notes, however, since 2000, the more general anti-discrimination provision in Education Code section 220 has prohibited discrimination based on sexual orientation and gender "in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid." Motion to Dismiss, at 6 n.3. Amici agree with the State that "it is difficult to conceive of a set of facts where, for example, there is a school sponsored activity that 'promotes a discriminatory bias' against a student because of [his or her] sexual orientation and thereby violates section 51500, but does not at the same time violate section 220 because the student is not 'subjected to discrimination on the basis of . . . sexual orientation.'" *Id.*

4. Prudential considerations strongly support dismissal.

In addition to the constitutional limits on justiciability, courts must weigh "prudential considerations" in their evaluation of ripeness, which include: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas*, 200 F.3d at 1141 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). Both of these considerations strongly support dismissal. Even were this Court to conclude that Plaintiffs present a ripe case or controversy in the constitutional sense, the Court should decline to exercise jurisdiction under the prudential component of the ripeness doctrine. *See id.*

First, there is no actual dispute requiring prompt resolution and the alleged conflict between the challenged statutes and the First Amendment is devoid of any specific factual context that would permit the Court even to meaningfully assess Plaintiffs' claims. Plaintiffs ask the Court to declare California laws unconstitutional, in the absence of any identifiable individuals who have suffered any actual injury as a result of their application and "with no concrete factual scenario that demonstrates how the laws, as applied, infringe their constitutional rights." *Thomas*, 200 F.3d at

1141. Even more starkly than in *Thomas*, the Plaintiffs' claims rest upon hypothetical situations with hypothetical students and teachers. Moreover, to the extent any genuine uncertainly regarding the proper construction of any of the challenged code sections may arise in the context of more concrete controversies in the future, California courts should be given an opportunity to construe the challenged laws. *See Renne v. Geary*, 501 U.S. 312, 323 (1991) (explaining that "[p]ostponing consideration of the [constitutional] questions presented, until a more concrete controversy arises, also has the advantage of permitting the state courts further opportunity to construe [the challenged law], and perhaps in the process to materially alter the question to be decided" (internal quotation marks omitted)).

Second, Plaintiffs will not suffer any identifiable hardship if the Court declines jurisdiction. The only harms Plaintiffs have alleged are purely conjectural and based on events that may never arise. Although Plaintiffs allege that the challenged statutes implicate First Amendment freedoms, they have not alleged that they wish or intend to engage in any constitutionally protected speech or expression that would be restricted by the statutes.[7] None of the plaintiffs have been prosecuted or charged with violating any of the challenged measures, nor is there any reasonable or imminent threat of enforcement. In contrast, "by being forced to defend [the challenged laws] in a vacuum and in the absence of particular victims of discrimination, the State . . . would suffer hardship were [the Court] to adjudicate this case now." *Thomas*, 200 F.3d at 1142. Likewise, the persons who directly benefit from these challenged laws— including the members of Equality California and the GSA Network—would potentially suffer great hardship were the Court to consider the constitutionality of these protections prematurely, in the absence of an adequate record upon which to base effective review.

B. Plaintiffs' First Cause Of Action Should Be Dismissed Pursuant To Rule 12(b)(6) Because Plaintiffs' Do Not State A Valid Facial Claim And Because The Challenged Statutes Are Clear.

Plaintiffs' First Cause of Action — which alleges that the challenged statutes violate the First and Fourteenth Amendments because they are facially void for vagueness, Complaint, ¶ ¶ 6,

[7] As explained in Section B. 1 below, as a matter of law, and based on settled federal and state precedent, none of the challenged statutes in this case restricts or reaches a substantial amount of constitutionally protected speech.

28-33 — fails to state a valid claim under Rule 12(b)(6) for at least two independent reasons. First, the challenged statutes do not restrict constitutionally protected speech and thus may not be challenged through a facial attack. Second, even if the statutes were subject to a vagueness challenge, they easily pass constitutional muster.

1. Plaintiffs' Facial Challenge Is Improper Because The Challenged Statutes Do Not Restrict A Substantial Amount Of Protected Expression And Therefore Cannot Be Challenged In A Facial Attack.

"A facial challenge is *only* permitted when the law reaches 'a substantial amount of constitutionally protected conduct' or 'is impermissibly vague in all of its applications.'" *United States v. Dischner*, 974 F.2d 1502, 1510 n.5 (9th Cir. 1992) (emphasis added) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031 (9th Cir.1997); *see also Roulette v. City of Seattle*, 97 F.3d 300, 305 (9th Cir. 1996) (plaintiffs may not bring a facial First Amendment challenge "unless, at a minimum, the challenged statute 'is directed narrowly and specifically at expression or conduct commonly associated with expression'") (quoting *City of Lakewood v. Plain Dealer Publishing,* 486 U.S. 750, 760 (1988)). Here, the statutes Plaintiffs seek to invalidate do not restrict or implicate protected speech, and Plaintiffs have not alleged (and could not credibly allege) that the challenged statutes are impermissibly vague in all of their applications. Accordingly, Plaintiffs' attempt to challenge these provisions through a facial attack is improper.

a. Penal Code Sections 422.6(a), 422.55(a)(2) and (6), 420.55(b), and 422.56(c) do not reach a substantial amount of protected speech.

Controlling authority directly rebuts Plaintiffs' conclusory allegation that the challenged Penal Code statutes "abut sensitive areas of basic First Amendment freedoms." Complaint, ¶ 3. In *Wisconsin v. Mitchell*, the U.S. Supreme Court held that hate crimes statutes like California's do not implicate First Amendment freedoms because they target conduct, not expression. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993); *see also United States v. Stewart*, 65 F.3d 918, 930 (11th Cir. 1995) ("Because we punish the act and not the opinion or belief which motivated it, the cross burning in this case was not protected by the First Amendment. . . ."). The Court in *Mitchell* expressly noted that the Wisconsin statute it upheld was "similar" to California's law. *Mitchell*, 508

U.S at 483 n.4 (citing Penal Code § 422.7).

The California Supreme Court has likewise held that California's hate crime statutes do not infringe upon constitutionally protected speech. In *In re M.S.*, a defendant challenged Penal Code section 422.6 on the ground that the statute was an impermissible "regulation of speech." *In re M.S.*, 10 Cal.4th at 721. The court rejected this argument, explaining that: "What section 422.6 generally prohibits is *conduct* . . . . Section 422.6 punishes the discriminatory threat of violence, not the thought behind it." *Id.* at 722-23 (emphasis in original);[8] *see also In re Joshua H.*, 13 Cal.App.4th 1734, 1749 (1993) ("it is the *act* of discrimination and differential treatment based on race or other status--not the thought behind the act--which is proscribed").

The California Supreme Court also has rejected the argument that California's hate crime laws (or anti-discrimination statutes generally) implicate free speech simply because some people may wish to engage in bias-motivated violence for an expressive purpose: "threats, intimidation and interference with the exercise of legal rights because of the victim's protected characteristic are not shielded from punishment merely because the actor espouses a bigoted philosophy." *In re M.S.*, 10 Cal.4th at 723. The court explained that the hate crime law prohibits acts of discriminatory violence because they are harmful, not because they may express an offensive idea. *In re M.S.*, 10 Cal.4th at 725 (holding that the hate crime law "does not impinge on freedom of expression" because "the conduct [it proscribes] is punishable . . . for reasons unrelated to its expressive content, and the enhancement is proper . . . to sanction bias-motivated conduct, not expression"); *see also Roberts v. U.S. Jaycees,* 468 U.S. 609, 628 (1984) ("acts of invidious discrimination . . . like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."). Thus, "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *In re M.S.*, 10 Cal.4th at 723 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)).

Based on this settled law, Plaintiffs can prove no set of facts supporting their claim that the

[8] The *M.S.* court noted that Penal Code section 422.6 had been amended to include gender and disability as protected categories after the defendants were convicted, though neither of those classifications was at issue in the case. *In re M.S.,* 10 Cal.4th at 707 n.1.

challenged Penal Code sections inhibit their protected expression or otherwise reach a substantial amount of constitutionally protected activity. Accordingly, Plaintiffs' facial challenge to those sections should be dismissed.

b. Education Code Sections 220, 210.7, 212.6 do not implicate a substantial amount of protected speech.

It is equally well-established that, as a general matter, anti-discrimination statutes such as Education Code section 220 likewise do not implicate constitutionally protected speech because – like the hate crime statute – they target harmful acts of discrimination, not expression. In *Mitchell*, the Supreme Court noted that it has repeatedly rejected claims that anti-discrimination statutes infringe upon protected speech. *Mitchell*, 508 U.S. at 487 (citing *Roberts* v. *United States Jaycees*, 468 U.S. at 628; *Hishon* v. *King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976)). Likewise, in *In re M.S.*, the California Supreme Court held that the government may prohibit discriminatory conduct "in a multiplicity of settings" and that such laws do not implicate First Amendment protected speech for the same reasons that California's hate crime statutes do not implicate protected speech. *In re M.S.*, 10 Cal.4th at 723.

Based on this settled law, Plaintiffs can prove no set of facts supporting their claim that Education Code section 220 or the related definitions of sexual orientation and gender inhibit their protected expression or otherwise reach a substantial amount of constitutionally protected activity. Accordingly, their facial challenge to these code sections should be dismissed with prejudice.

c. Education Code Section 51500 does not reach a substantial amount of protected speech.

By its express terms, Education Code section 51500 applies only to teacher "instruction" and to school district sponsored activities. With regard to such instruction and activities, it is well settled that when the government itself speaks, "its control of its own speech is not subject to the constraints of constitutional safeguards." *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000). In *Downs*, the Ninth Circuit held that a public high school may, as part of its lesbian and gay awareness month, create a bulletin board for articles promoting acceptance of lesbian and gay people and may prohibit a teacher from posting articles with a contrary view. A school "may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives." *Id.* at 1014. Accordingly, section 51500 does not implicate protected speech insofar as it applies to school-sponsored activities, where the government's power to express its own views and to control the speech of its agents and representative is greatest. *See also*, *e.g., Rust v. Sullivan,* 500 U.S. 173, 194-200 (1991) (upholding federal regulations prohibiting recipients of federal funds from promoting abortion).

With regard to "instruction," a somewhat different analysis must be applied because "[n]either [the Ninth Circuit] nor the Supreme Court has definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment." *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1148 (9th Cir. 2001). In *California Teachers Association*, the Ninth Circuit held that the term "instruction" in a California English-only statute referred only to "the language teachers use to present the curriculum to students in California public schools" and not to other, non-curricular teacher speech, including informal interactions with students. 271 F.3d at 1148. Without resolving the issue, the Ninth Circuit "assume[d] *arguendo* that the instructional speech covered by [the statute] receives some First Amendment protection" and applied the standard articulated in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *California Teachers Ass'n*, 271 F.3d at 1148-49. The Ninth Circuit explained, however, that a less rigorous standard should apply to the plaintiffs' vagueness claim even under the *Hazelwood* standard: "Because any speech potentially chilled by [the statute] enjoys only minimal First Amendment protection, assuming it enjoys any protection at all, and because it is the state's pedagogical interests that are paramount in this context, any vagueness contained in [the statute] is even less likely to jeopardize First Amendment values." *Id.* at 1154. The Court rejected the plaintiffs' First Amendment challenge because the statute's limitation on "instruction" did not reach a substantial amount of protected speech. *Id.* at 1155.

That analysis applies equally in this case. Even assuming for the sake of argument that teacher instructional speech is entitled to some First Amendment protection, the limitation on "instruction" in section 51500 is not impermissibly vague because it is unlikely that any ambiguity in the statute will chill any more than a negligible amount of protected speech. This conclusion is strongly reinforced by the fact that Plaintiffs cannot identify any protected speech that even arguably would be prohibited under section 51500. See discussion infra, at section A.3.

2. The Challenged Statutes Are Not Impermissibly Vague.

Due process does not "require 'impossible standards' of clarity," *Kolender v. Lawson*, 461 U.S. 352, 361 (1983), and the constitutional prohibition against excessive vagueness does not invalidate every statute that could have been crafted with greater precision, "'for in most English words and phrases there lurk uncertainties.'" *McSherry v. Block,* 880 F.2d 1049, 1054 (9th Cir. 1989) (quoting *Rose v. Locke,* 423 U.S. 48, 50 (1975) (internal citation omitted)); *see also Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."); *United States v. Gilbert,* 813 F.2d 1523, 1530 (9th Cir. 1987), *overruled on other grounds as stated in United States v. Hanna,* 293 F.3d 1080, 1088 n.5 (9th Cir. 2002) ("'Words inevitably contain germs of uncertainty.'" (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 608 (1973))). Rather, to satisfy due process, a statute simply "must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (internal quotation marks omitted). The statutes Plaintiffs challenge plainly meet that standard.

a. Penal Code sections 422.6(a) and 422.55(b) incorporate a specific intent requirement and therefore are not impermissibly vague.

Plaintiffs allege that Penal Code sections 422.6(a) and 422.55(b) are impermissibly vague. Complaint, ¶ 30. While the former provides a substantive definition for hate crimes,[9] the latter appears to have been challenged by Plaintiffs simply because it cross-references the former, since Plaintiffs do not object to section 422.55(b) on any independent ground.

While Plaintiffs claim that it will be "impossible" to know whether administrators and educators are violating the Penal Code (Complaint, ¶ 1: 11-12), the sections Plaintiffs challenge

[9] Penal Code Section 422.6 is part of the Tom Bane Civil Rights Act, and was "enacted by the Legislature in 1987 in response to the alarming escalation in the incidence of hate crimes in California and the inadequacy of existing laws to deter and punish them." *In re M.S.,* 10 Cal.4th 698, 707 n.1 (1995).

contain express *mens rea* requirements. Because Plaintiffs cannot face liability under the law for acting "by mistake" under a hate crime scheme that requires specific intent, and the law cannot be therefore described as "a trap for those who act in good faith," California's hate crime laws are not unconstitutionally vague. *Gonzales v. Carhart,* 127 S.Ct. 1610, 1628 (2007) (internal quotations omitted).

In *People v. Lashley,* the California Court of Appeal held that in order to violate section 422.6, a defendant must act with a specific intent to deprive another of a clearly defined right before a conviction can be had. 1 Cal.App.4th at 947-48. In *In re M.S.*, the California Supreme Court affirmed *Lashley's* construction of section 422.6's *mens rea* requirement, finding that this element "helps to protect against unconstitutional application to protected speech." *In re M.S.,* 10 Cal.4th at 713. The conduct prohibited by section 422.6 is "objectively clear" for purposes of guiding law enforcement, since "discriminatory motivation is an element that must be proved beyond a reasonable doubt." *Id.* at 718. The court concluded that one who "willfully threatens violence against another" as required for a violation of section 422.6, "motivated by the victim's protected characteristic, cannot later be heard to complain he or she was unaware such conduct might violate section[] 422.6." *Id.*

In light of the long-established authority interpreting section 422.6's key provisions, including the statute's *mens rea* requirement and the terms "willfully," "because of," "by force or threat of force" and "willfully injure, intimidate, interfere with," Plaintiffs cannot be heard to argue that they lack fair warning about those prohibitions of the law. [10] The California courts' authoritative constructions of sections 422.6 and 422.55(b) foreclose Plaintiffs' facial challenge to those provisions.

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[10] Because Plaintiffs fail in their first cause of action to identify any specific language that they charge is unconstitutionally vague, Amici are left to guess at the provisions of the statutes alleged to be constitutionally infirm. No further degree of specificity, however, could rehabilitate Plaintiffs' claims because the language in the challenged statutes is sufficiently clear to satisfy due process concerns as a matter of law. Because it is clear that "the complaint could not be saved by any amendment," Plaintiffs' complaint should be dismissed without leave to amend. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.,* 368 F.3d 1053, 1061 (9th Cir. 2004).

b. The challenged Penal Code and Education Code provisions are not impermissibly vague by virtue of their use or incorporation of the terms "sexual orientation," "gender," or "gender identity."

Although Plaintiffs' First Cause of Action does not identify any specific statutory language alleged to be impermissibly vague, it appears from other portions of the Complaint that Plaintiffs regard the terms "sexual orientation" or "gender" as defined or incorporated in the challenged statutory provisions to be impermissibly vague. As explained below, Plaintiffs have failed to state a claim under any such theory.[11]

i. Sexual orientation and gender (including gender identity) are words of common usage and understanding.

Courts considering vagueness challenges look to a variety of sources to determine whether the challenged terms are of such "common understanding" that they provide a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Gospel Missions of Am.,* 419 F.3d at 1047 (internal quotation omitted). Sexual orientation and gender are expressly defined in the statutes, and are also words of common usage that are used and understood across a large body of legal, academic and popular sources.

"Sexual orientation" is defined in identical terms by both Penal Code section 422.56(h), which Plaintiffs do not challenge here, and Education Code section 212.6, as "heterosexuality, homosexuality, or bisexuality." "Gender" is defined consistently by Penal Code section 422.56(c) and Education Code section 210.7, both of which provide that "gender" means "sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." The definitions set forth in these statutes are consistent with similar definitions that have existed in other California statutes for many years. Identical definitions for sexual orientation are included expressly or by incorporation in the Unruh Civil Rights Act (Civil Code section 51(e)(6)), which adopted the definition first established in 1985 by the former Ralph Civil Rights Act in former Civil Code section 51.7(b), and the Fair

[11] The analysis that follows applies as well to the First Cause of Action's unusual vagueness challenge to "the removal of Education Code § 212." Complaint, ¶ 29. Prior to S.B. 777's enactment, former Education Code section 212 defined "sex" as "the biological condition or quality of being a male or female human being."

Employment and Housing Act (Government Code section 12926(q)), which has been in effect since 1999. 1999 Cal. Stat., ch. 592, § 3.7. The definition of gender in Penal Code section 422.56(c), which has been in effect since 2005, has been incorporated by reference in the Fair Employment and Housing Act (Government Code section 12926(p)), Health & Safety Code section 1365.5(e), and Government Code section 11135(e). A similar definition of gender had previously been in effect since 1999. *See* 1998 Cal. Stat., ch. 933, § 3 (former Cal.Penal Code § 422.76 (West 2004), current version at Cal. Penal Code § 422.56(c)).

The terms sexual orientation and gender identity have been incorporated with similar definitions in statutes and ordinances in jurisdictions across the country.[12]

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[12] Many other states and local governments have adopted definitions of "sexual orientation" similar to the definition that Plaintiffs challenge here. See, e.g., Colo. Rev. Stat. § 24-34-401 (2007) (for purposes of employment protections, defining sexual orientation as "a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer's perception thereof"); Haw. Rev. Stat. §§ 378-1, 489-2, 515-2, 846-51 (2007) (defining sexual orientation to mean "having a preference for heterosexuality, homosexuality, or bisexuality," "having a history of any one or more of these preferences," or "being identified with any one or more of these preferences," for purposes of laws prohibiting discrimination in employment, public accommodations and real property transactions, and for hate crime reporting); Iowa Code Ann. § 216.2(12A) (2006) (providing that sexual orientation means "actual or perceived heterosexuality, homosexuality, or bisexuality" for purposes of prohibiting discrimination in employment, public accommodations, housing, education and credit); Mass. Ann. Laws § 3(6) (2007) (defining sexual orientation as "having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality" for purposes of prohibiting employment discrimination); N.H. Rev. Stat. Ann. § 354-A:2 (2007) (defining sexual orientation as "having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality" for purposes of civil rights law); N.M. Stat. Ann. § 28-1-2(P) (2007) (providing that sexual orientation means "heterosexuality, homosexuality or bisexuality, whether actual or perceived" for purposes of anti-discrimination protections in employment, public accommodations and real estate and financial transactions); Nev. Rev. Stat. Ann. § 613.310(6) (2007) (defining sexual orientation as "having or being perceived as having an orientation for heterosexuality, homosexuality or bisexuality" for purposes of employment protections); Wis. Ann. Stat. § 111.32(13m) (2006) (for purposes of employment protections, defining sexual orientation as "having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference").

A number of other states have adopted definitions of "gender" or "gender identity" similar to the statutory definitions in place in California. *See*, *e.g*., Haw. Rev. Stat. §§ 489-2, 489-3, 515-3, H.R.S. 846-51 (2007) (prohibiting discrimination in real property transactions and public accommodations based on "a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression, regardless of whether that gender-related expression is different from that traditionally associated with the person's sex at birth"); R.I. Gen. Laws §§ 28-5-6 (10), 34-37-3 (17), 34-37-4 (2007) (prohibiting discrimination in employment and housing based on "'Gender identity or expression' [which] includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth."); N.M. Stat

The federal Supreme Court and the Ninth Circuit alone have decided scores of cases involving sexual orientation[13] and gender identity.[14] Legal scholarship[15] and popular discourse[16]

Ann. §§ 28-1-2(Q), 28-1-7 (2007) (banning discrimination in employment, housing and public accommodations based on "a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth"); Iowa Code Ann. §§ 216.2(9A), 216.6-216.10 (2006) (prohibiting discrimination in employment, public accommodations, housing, education and credit based on the "gender-related identity of a person, regardless of the person's assigned sex at birth"); N.J. Stat. Ann. §§ 10:5-4, 10:5-5(rr) (West 2007) (barring discrimination in employment, public accommodations, housing and other real property based on gender identity or expression, which is defined to mean "having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth"); Wash. Rev. Code §§ 49.60.030, 49.60.040(15) (2007) (barring discrimination in employment, credit and insurance transactions, places of public resort, accommodation, or amusement, and real property transactions based on gender expression or identity, which is defined as "having or being perceived as having a gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth").

[13] *See, e.g., Lawrence v. Texas,* 539 U.S. 558, 581 (2003) (O'Connor, J., concurring in the judgment) (describing invalidated Texas sodomy statute as criminalizing only sodomy engaged in by those with a "same-sex sexual orientation"); *Romer v. Evans,* 517 U.S. 620 (1996) (overturning a state constitution amendment that repealed and banned all anti-discrimination measures based on sexual orientation); *Hernandez-Montiel v. INS,* 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005).

[14] *See, e.g.,* Schwenk v. Hartford, 204 F.3d 1187 (9th 2000) (holding that Title VII protects transgender people and prohibits discrimination based on "gender," which includes a person's "inward identity" as female or male, as well as on biological "sex"); *Schroer v. Billington,* 424 F.Supp.2d 203, 205 (D.D.C. 2006) (describing gender identity is "a person's internal psychological identification as a man or a woman."); *R.G. v. Koller,* 415 F.Supp.2d 1129, 1142-43 (D. Haw. 2006) (describing discrimination against youth in juvenile justice facilities based on actual or perceived "gender identity"); *Manago v. Barnhart,* 321 F.Supp.2d 559, 561-62 (E.D.N.Y. 2004) (reviewing expanding case law and statutory protections based on gender identity); *Cruzan v. Special Sch. Dist. # 1,* 294 F.3d 981, 983 (8th Cir. 2002) (discussing Minnesota law that prohibits discrimination on the basis of a person's "self-image or identity not traditionally associated with one's biological maleness or femaleness"); *Doe ex rel. Doe v. Yunits*, 2001 WL 664947, *1 (Mass.Super. 2001) (describing eighth grade student as "ha[ving] a female gender identity and prefer[ring] to be referred to as a female"); *Rush v. Johnson,* 565 F.Supp 856, 863 (N.D. Ga. 1983) (describing gender identity as "the sense of knowing to which sex one belongs, that is, the awareness that 'I am a male' or 'I am a female'" and "gender role" as the public expression of gender identity"); *M.T. v. J.T.*, 140 N.J.Super. 77, 80 (1976) (expert witness's definition of gender identity as "a total sense of self as being masculine or female").

[15] Scholars have published many academic legal articles about sexual orientation and gender identity. *See, e.g.,* Chai Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited,* 57 U. Pitt. L. Rev. 237 (1996); *Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification,* 98 Harv. L. Rev. 1285 (1985); Jennifer Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 5 Colum. J. Gender & L. 90 (2006); Fatima

also routinely use these terms.

ii. Other courts have rejected vagueness challenges to the terms sexual orientation and gender identity.

To the best of Amici's knowledge, every federal and state court that has considered the issue has rejected arguments that either the term "sexual orientation" or the term "gender identity" is impermissibly vague. In one such challenge a federal district court in Kentucky considered the validity of ordinances prohibiting discrimination "because of … sexual orientation and gender identity." *Hyman v. City of Louisville,* 132 F.Supp.2d 528, 530 (W.D. Ky. 2001) (vacated on other grounds in 53 Fed. Appx. 740 (6th Cir. Ky. 2002)). The court noted that "[s]everal courts have been faced with, and discussed, 'sexual orientation' as it is used in various statutes and regulations" and that "[n]one have found either the term, or a phrase which uses the term, vague in the face of a Due Process Clause challenge." *Id.* at 546 (citing *State v. Palermo,* 765 So. 2d 1139, 1153 (La. App. 2000) ("The language of the statute uses generally accepted meanings, words, or phrases, which have a fixed and definite meaning for the person of ordinary intelligence. The phrase, 'because of actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry,' is such that a person of ordinary intelligence would be given fair notice of what conduct is subject to a Hate Crime."); and *State v. Mortimer,* 135 N.J. 517, 534 (N.J. 1994) (holding that a prohibition against committing a criminal offense with a purpose to intimidate because of sexual orientation or other characteristics "describes the conduct prohibited with sufficient clarity to survive a 'vagueness' challenge."); s*ee also State v. Plowman,* 314 Ore.

Mohyuddin, *United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered?,* 12 Hastings Women's L.J. 387 (2001).

[16] The concepts of sexual orientation and gender identity have appeared pervasively in the media and popular literature for many years. For example, major weekly news magazines have featured stories about sexual orientation and gender identity for many years, including an April 14, 1997 Time Magazine cover story featuring actress Ellen Degeneres discussing her sexual orientation (see Bruce Handy, Roll Over, Ward Cleaver, Time, Apr. 14, 1997, available at http://www.time.com/time/covers/0,16641,19970414,00.html (last visited January 18, 2008)) and a May 21, 2007 Newsweek Magazine cover story dedicated to gender and gender identity (see Newsweek Cover: The Mystery of Gender, May 13, 2007, http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/05-13-2007/0004587007&EDATE= (last visited January 18, 2008)).

157, 161-62 (1992) (holding that the language "because of their perception of [the victims'] race, color, religion, national origin or sexual orientation" was not unconstitutionally vague under the Oregon and federal constitutions). The *Hyman* court also noted that "[w]hile 'gender identity' is less commonly addressed by courts, those that have attempted to define the term have done so consistently." *Id.* at 546 (listing authorities providing similar definitions for gender identity). The same result is appropriate here.

C. This Court Should Decline Supplemental Jurisdiction Over Plaintiffs' State Law Claim.

As the State Defendants have argued, this Court should decline to exercise supplemental jurisdiction over Plaintiffs' Second Cause of Action, which alleges that the challenged statutes violate the California Privacy Clause. Plaintiffs' Second Cause of Action raises novel issues of state law that are particularly ill-suited for resolution based on a facial challenge in federal court. 28 U.S.C. § 1367(c)(1). Plaintiffs' Second Cause of Action is based "[p]articularly" on the allegation that California's statutory prohibitions of discrimination in schools against transgender persons (that is, persons whose gender identity differs from their assigned sex at birth) deprives Plaintiffs of their entitlement "to safety and privacy in restrooms, locker rooms, and other public facilities where males and females are systematically separated based upon the reasonable expectation of privacy." Complaint, ¶ 36. Plaintiffs' Second Cause of Action raises the novel issue of whether even if the California Constitution protects certain privacy interests in sex-segregated facilities,[17] permitting transgender persons to use such facilities consistent with their gender identities would infringe upon any such privacy interests of others. It seems likely that any such interest under the California Constitution would extend to *all* Californians and that transgender persons likewise would have relevant privacy interests in connection with the use of restroom facilities, including the use of facilities consistent with their gender identities. There is no warrant, however, for a federal court to be the first to wade into these novel state-law issues on a facial challenge to the statutes that Plaintiffs seek to invalidate.[18]

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[17] *See, e.g., Koire v. Metro Car Wash*, 40 Cal. 3d 24, 38 (1985) (stating in dicta that "some sex-segregated facilities, such as public restrooms, may be justified by the constitutional right to personal privacy").

There are further "compelling reasons for declining jurisdiction" over Plaintiffs' Second Cause of Action. 28 U.S.C. § 1367(c)(4). As the State Defendants have explained, under the Eleventh Amendment, this Court lacks power to issue declaratory or injunctive relief against the State Defendants on state-law grounds. Memorandum in Support of Motion to Dismiss at 19-20. The only conceivable basis on which this Court could entertain Plaintiffs' Second Cause of Action would be if Plaintiffs' Complaint sought nominal damages. As noted earlier, the Complaint's Prayer for Relief contains no such request, although the Complaint's caption suggests otherwise. In any event, under the "exceptional circumstances," 28 U.S.C. § 1367(c)(4), presented by Plaintiffs' attempt to invalidate numerous state statutes on novel state-law grounds, this Court should decline to exercise supplemental jurisdiction over the Second Cause of Action.

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[18] Education Code section 231 provides that: "Nothing herein shall be construed to prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes, so long as comparable facilities are provided." To Amici's knowledge, no California court has construed this provision in connection with the rights of transgender persons.

IV. CONCLUSION

For the foregoing reasons, Amici request that this Court grant the State's Motion to Dismiss.

Dated: January 18, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am employed in the City and County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is 870 Market Street, Suite 370, San Francisco, CA 94102

On January 18, 2008, I served the following document(s) described as:

[PROPOSED] MEMORANDUM OF POINTS AND AUTHORITIES OF AMICI CURIAE EQUALITY CALIFORNIA AND GAY-STRAIGHT ALLIANCE NETWORK IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

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[X] **FEDERAL**: I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 18, 2008, at San Francisco, California.

s/ Vanessa H. Eisemann
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